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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

9 Michael Kielsky,

10 Petitioner,

11 vs.

12 Hon. Michael Morales, et al.,

13 Respondents.

PHX
No. CIV 00-1343-PCT-EHC (JI)

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ORDER

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Michael Kielsky, Petitioner, filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. §2254. [Dkt. 1]. Petitioner filed an Amended Petition for Writ of Habeas Corpus. [Dkt. 3]. Respondents filed a Motion to Dismiss the Petition [Dkt. 9], which the Court denied. [Dkt. 19]. Respondents then filed an Answer addressing the merits of Petitioner's Amended Petition. [Dkt. 21]. Petitioner filed a Reply [Dkt. 24] and an Amended Reply [Dkt. 28].

Magistrate Judge Irwin filed a Report and Recommendation, recommending that Petitioner's Amended Petition be denied. [Dkt. 29]. Petitioner filed Objections to the Magistrate Judge's Report and Recommendation [Dkt. 30] and a Supplemental Brief in Support of his Objections. [Dkt. 33].

STANDARD OF REVIEW

A district court judge reviews de novo the Report and Recommendation of a Magistrate Judge. See 28 U.S.C. §636(b)(1)(C) and Rule 1.15(b), Rules of Practice of the United States District Court for the District of Arizona.

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Although the Magistrate Judge did not rely on Arizona Rule of Criminal Procedure 32.2 ("Rule 32.2") in finding that Petitioner had procedurally defaulted, the Report and Recommendation noted that Rule 32.2 had been found to not be "independent" of federal law. [Dkt. 29, p. 18 (citing Smith v. Stewart, 241 F.3d 1191 (9th Cir. 2001))]. Since the Report and Recommendation was issued in this case, the United States Supreme Court reversed the Ninth Circuit's ruling in Smith, and found, based on a ruling by the Arizona Supreme Court to a certified question, that because a finding of preclusion under Rule 32.2(a)(3) does not require an examination of the merits of the claim, it is independent of federal law. See Stewart v. Smith, 122 S. Ct. 2578 (2002).

IT IS ORDERED adopting the Report and Recommendation of the Magistrate Judge [Dkt. 29] as supplemented by this Order.

IT IS FURTHER ORDERED that Petitioner's Amended Petition for Writ of Habeas Corpus [Dkt. 3] is **DENIED** and Judgment shall be entered accordingly.

DATED this 11 day of September, 2002.

Earl H. Carroll
United States District Judge